

Message Text

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FM SECSTATE WASHDC
TO AMEMBASSY LIMA IMMEDIATE

C O N F I D E N T I A L STATE 116816

E.O. 11652:GDS

TAGS:PE, EINV, EMIN, EFIN

SUBJECT:MARCONA -- PROBLEMS WITH SHIPPING CONTRACT

REF: LIMA 4076

1. DEPARTMENT CONFIRMS THAT ON 18 MAY MARCONA RECEIVED A LETTER FROM CPV (SEPTTEL) NOTING THAT MARCONA HAD TRANSPORTED 3.338 MILLION LONG TONS OF ORE UNDER THE DECEMBER 11, 1975 CONTRACT, CITING ARTICLE 1(C) OF THE SEPTEMBER 22 INTERGOVERNMENTAL AGREEMENT AND REQUESTING THAT PURSUANT TO THAT AGREEMENT, MARCONA REFUND TO CPV ALL MONIES RECEIVED IN EXCESS OF \$2 MILLION.

2. IN THE FIRST PLACE, CPV'S LETTER IS BASED ON A MISINTERPRETATION OF BOTH THE SHIPPING CONTRACT AND THE AGREEMENT. THE \$2 MILLION FIGURE IN ARTICLE 1(C) OF
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THE AGREEMENT WAS AN ESTIMATE INCLUDED BECAUSE OF PERU'S DESIRE TO HAVE A FIGURE -- WHICH COULD NOT BE PINPOINTED-- APPEAR IN THE AGREEMENT. THAT SUBPARAGRAPH SPECIFICALLY STATES THAT THE DECEMBER 11 CONTRACT REMAINS IN FORCE UNTIL MARCH 31, 1977, AND EXPLAINS THAT THE MONIES ARE DERIVED FROM CALCULATING A DOLLAR PER LONG TON AT THE RATES ESTABLISHED UNDER SAID CONTRACT. THE SHIPPING

CONTRACT MAKES NO MENTION, OF COURSE, OF THE \$1.00 PER TON. UNDER ARTICLE II OF THE AGREEMENT, THE RESPONSIBILITIES AND OBLIGATIONS OF PERU TOWARDS MARCONA, INsofar AS THE GOVERNMENT OF THE UNITED STATES IS CONCERNED, ARE SATISFIED ONLY THROUGH THE FULFILLMENT OF THE CONTRACTUAL OBLIGATIONS "FOR IMPLEMENTATION BY ITS PERTINENT PUBLIC ENTITIES, AS STIPULATED IN ARTICLE 1...". ARTICLE IV ALSO REFERS TO THE "CONTRACTUAL OBLIGATIONS", NOT TO ANY SPECIFIED AMOUNTS. THUS, AS OFFICIALS OF THE GOVERNMENT OF PERU ARE FULLY AWARE, PERU'S OBLIGATIONS UNDER THE SETTLEMENT ARE THE PAYMENT OF THE PROMISORY NOTE OF \$37 MILLION PLUS INTEREST AND THE PERFORMANCE IN GOOD FAITH BY THE RESPECTIVE PERUVIAN ENTITIES OF THEIR FULL OBLIGATIONS UNDER THE TWO CONTRACTS. THE \$2 MILLION WAS AN APPROXIMATION BY THE GOVERNMENT OF PERU, BASED ON THE ESTIMATES AS OF MID-SEPTEMBER 1976. HAD MARCONA TRANSPORTED LESS THAN 2 MILLION TONS OF ORE UNDER THE SHIPPING CONTRACT, THEY WOULD HAVE HAD NO CLAIM AGAINST THE GOP FOR ANY ADDITIONAL MONIES; SIMILARLY, THE FACT THAT THEY TRANSPORTED MORE THAN \$2 MILLION DOES NOT GIVE CPV ANY LEGAL BASIS FOR A REFUND.

3. GOP SHOULD ALSO BE REMINDED THAT BECAUSE OF INCREASED PORT COSTS AND FREIGHT RATES, MARCONA'S MARGIN WAS UNDOUBTEDLY CONSIDERABLY LESS THAN \$1.00 PER TON; IN FACT, THE EXPIRATION DATE OF THE SHIPPING CONTRACT, AND THE LANGUAGE IN ARTICLE 6 WAS INCLUDED IN LARGE PART BECAUSE CPV WAS AFRAID MARCONA WOULD REFUSE TO CONFIDENTIAL

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CONTINUE TO CARRY ORE AT THE PRICES SPECIFIED IN THE CONTRACT FOR THE DURATION OF THE CONTRACT.

4. FINALLY, THE SETTLEMENT AGREEMENT ITSELF DOES NOT ABRIDGE OR MODIFY THE TERMS OF EITHER THE ORE SALES OR THE SHIPPING CONTRACT; IT COULD NOT DO SO BECAUSE MARCONA IS NOT A PARTY TO THE INTERGOVERNMENTAL AGREEMENT. IN FACT, IN ARTICLE 6 OF THE AGREEMENT (AN ARTICLE WHICH WAS INSERTED AT THE REQUEST OF THE GOVERNMENT OF PERU), IT IS STATED THAT MARCONA ACCEPTS AND PROMISES TO CARRY OUT IN GOOD FAITH THE TWO CONTRACTS. THE DECEMBER 11 CONTRACT BY ITS TERMS DOES NOT IN ANY WAY LIMIT THE AMOUNTS OF MONIES TO BE RECEIVED BY MARCONA UNDER THE CONTRACT TERMS.

5. AMBASSADOR SHOULD SEEK MEETING WITH FONMIN DE LA PUENTE IMMEDIATELY FOR DEMARCHE ALONG THE LINES OF PARAS 2 THROUGH 4 ABOVE. YOU SHOULD INDICATE TO DE LA PUENTE OUR SURPRISE AT BEING ADVISED OF THE

CPV LETTER, CONFLICTING AS IT DOES WITH THE CONTRACT, THE AGREEMENT AND THE CLEAR UNDERSTANDING OF ALL PARTIES AT THE TIME OF SETTLEMENT. YOU SHOULD ALSO POINT OUT TO HIM THAT IF THE GOP IS TAKING SUCH ACTION WITH RESPECT TO THE SHIPPING CONTRACT, WE CAN HAVE LITTLE CONFIDENCE THAT THE PERUVIANS WILL FULLY PERFORM THE MORE FINANCIALLY SIGNIFICANT ORE SALES CONTRACT IF THE AMOUNTS REALIZED BY MARCONA EXCEED \$22.44 MILLION. THE RESULT WE ARE SEEKING, OF COURSE, IS TO HAVE CPV LETTER WITHDRAWN.

6. WE ARE PREPARED TO GO FORWARD WITH DIPLOMATIC NOTE ALONG THESE LINES BUT WOULD PREFER TO RESOLVE THE MATTER ORALLY IF POSSIBLE. CHRISTOPHER

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Message Attributes

Automatic Decaptioning: X
Capture Date: 01-Jan-1994 12:00:00 am
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: AGREEMENTS, CARGO HANDLING, IRON, CONTRACTS
Control Number: n/a
Copy: SINGLE
Sent Date: 20-May-1977 12:00:00 am
Decaption Date: 01-Jan-1960 12:00:00 am
Decaption Note:
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 22 May 2009
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1977STATE116816
Document Source: CORE
Document Unique ID: 00
Drafter: DAGANTZ:MRP
Enclosure: n/a
Executive Order: GS
Errors: N/A
Expiration:
Film Number: D770180-0718
Format: TEL
From: STATE
Handling Restrictions: n/a
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Original Classification: CONFIDENTIAL
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TAGS: EINV, EMIN, EFIN, PE, MARCONA
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